

ARKANSAS SUPREME COURT

No. CR 07-768

Opinion Delivered

January 31, 2008

NICHOLAS BROWN
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE MOTION FOR BELATED
APPEAL OF JUDGMENT OF
CONVICTION [CIRCUIT COURT OF
CLEVELAND COUNTY, CR 2006-5,
HON. LARRY W. CHANDLER,
JUDGE]

MOTION DENIED.

PER CURIAM

On February 20, 2007, petitioner Nicholas Brown was found guilty by a jury of attempted theft of property, a felony, and misdemeanor theft of property. An aggregate sentence of seventy-two months' imprisonment was imposed. Petitioner was represented at trial by his retained attorney Don E. Warren, Sr. No appeal was taken from the judgment of conviction, which was entered on February 28, 2007, and petitioner sought to proceed with a belated appeal pursuant to Ark. R. App. P.–Crim. 2(e), which permits a belated appeal in a criminal case in some instances. Petitioner contended that he asked Mr. Warren to file an appeal from the judgment and was assured that counsel would do so.

It is the practice of this court when a pro se motion for belated appeal is filed in which the petitioner contends that he made a timely request to appeal, and the record does not contain an order relieving trial counsel, to request an affidavit from the trial attorney in response to the allegations in

the motion. There was no order relieving Mr. Warren in the record filed in this case. The affidavit requested of trial counsel was required because Ark. R. App. P.–Crim. 16 provides in pertinent part that trial counsel, whether retained or court appointed, *shall* continue to represent a convicted defendant throughout any appeal, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. We have held, however, that a defendant may waive his right to appeal by his failure to inform counsel of his desire to appeal within the thirty-day period allowed for filing a notice of appeal under Ark. R. App. P.–Crim. 2(a)(4). *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997) (per curiam); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988) (per curiam).

Mr. Warren in his affidavit stated that he thoroughly discussed whether to appeal with petitioner and petitioner decided not to appeal. He further stated that there was no communication between them after the decision was made.

As petitioner's and counsel's accounts of whether counsel was asked to appeal were in direct conflict and required findings of fact, we remanded the matter to the trial court for an evidentiary hearing on whether counsel was informed by petitioner within the time period allowed for filing a notice of appeal that he desired to appeal. *Brown v. State*, CR 07-768 (Ark. Oct. 11, 2007) (per curiam). The findings and the transcript of the evidentiary hearing are now before us.

The court took testimony at the hearing from petitioner, petitioner's mother, and Mr. Warren. After hearing the testimony, the court concluded that Mr. Warren's testimony that he was not asked to appeal from the judgment was more credible than the testimony of petitioner. As the merit of the motion for belated appeal rests entirely on the credibility of the witnesses, and this court recognizes that it is the lower court's task to assess the credibility of witnesses and resolve any

conflicts of fact, we accept the trial court's findings. *See Frazier v. State*, 339 Ark. 173, 3 S.W.3d 334 (1999) (per curiam) (citing *Allen v. State*, 277 Ark. 380, 641 S.W.2d 710 (1982) (per curiam)).

The motion for belated appeal is denied.

Motion denied.